IN THE

Supreme Court of the United States

October Term, 1943.

No. 454.

ALICE BILLINGSLEY,

Petitioner,

vs.

C. B. HORRALL, Chief of Police,

Respondent.

Respondent's Brief on Petition for Certiorari.

RAY L. CHESEBRO,
City Attorney;
DONALD M. REDWINE,
Assistant City Attorney;
JOHN L. BLAND,
Deputy City Attorney,
278 City Hall, Los Angeles, 12,
Counsel for Respondent.

Parker & Baird Company, Law Printers, Los Angeles

SUBJECT INDEX.

TABLE OF AUTHORITIES CITED.

CASES.

STATUTES.

IN THE

Supreme Court of the United States

October Term, 1943.
No. 454.

ALICE BILLINGSLEY,

Petitioner,

vs.

C. B. HORRALL, Chief of Police,

Respondent.

Respondent's Brief on Petition for Certiorari.

Foreword.

Examination of the copy of the petition filed in this court in the above entitled action discloses that, although it purports to be an application for original writ of habeas corpus as well as for certiorari, it is not signed by the petitioner and is not verified.

Examination also discloses that the petitioner challenges the validity of the judgment of the court upon the ground that the conviction was obtained through the use of a paid informer who entrapped the petitioner. This concerns procedure in the trial court, and if it is the intent of the petitioner to review the correctness of the judgment, it would appear that the People of the State of California, plaintiff in such court, should be a party to the instant proceeding.

Both of the matters above mentioned will be more fully discussed in our argument.

Statement of the Case.

This is, in effect, a petition to review the action of the Supreme Court of California in denying a writ of habeas corpus. Certain proceedings in the lower courts of the State are set out in the record of such court, to which reference will be made.

The petitioner herein, defendant in the trial court, was charged with violation of Section 41.05 of the Los Angeles Municipal Code (Ordinance No. 77,000) [Tr. p. 12, fol. 19], which reads as follows:

> "Sec. 41.05. *Prostitution—Offering:*
>
> No woman shall offer her body for the purpose of prostitution or solicit any man to have intercourse with her, for money, or agree to have carnal intercourse with any man for money."

The offense is colloquially referred to as "offering."

After trial by jury petitioner was found guilty [Tr. p. 14, fol. 21]. Motion for new trial was filed April 5, 1943, and on that date was denied [Tr. p. 14, fol. 21] after which, on said date, the cause was continued to April 15, 1943, on the "court's own motion," for probation and sentence [Tr. p. 15, fol. 21].

On April 15, 1943, probation report was filed, judgment of imprisonment for 180 days was pronounced, and probation was ordered [Tr. pp. 15 and 16, fol. 22]. Thereafter, appeal to the Appellate Department of the Superior Court was perfected. On June 30, 1943, such court af-

firmed the judgment of the trial court and set aside the order of probation [Tr. p. 17, fol. 24].

Subsequently, on July 9, 1943, the petitioner was committed in accordance with the terms of the sentence previously imposed.

The petition for writ filed in the State Supreme Court contains many allegations which are unsupported by the record presented. The petition filed in this court likewise contains certain allegations not supported by the record. Discussion of such matters will appear in our argument, and it is deemed unnecessary to burden the court with an analysis of such statements at this point.

In submitting our argument we shall follow our objections to the jurisdiction of this court by discussion of the various paragraphs of petitioner's application to the Supreme Court of this State substantially in the order in which they appear in the transcript of the record served in connection with the petition herein.

ARGUMENT.

Summary of Argument.

1. Objections to jurisdiction upon the ground that the petition filed in this court is insufficient as a petition for original writ of habeas corpus; there is a lack of proper parties respondent, and habeas corpus is not the proper remedy.

   a. The petition filed in this court is insufficient as a petition for original writ of habeas corpus.

   b. There is a lack of proper parties respondent.

   c. Habeas corpus is not the proper remedy.

2. The judgment of the Appellate Department of the Superior Court is not void or in excess of its jurisdiction.

3. The Municipal Court did not lose jurisdiction to sentence.

4. The alleged invalidity of conditions of probation is immaterial to the instant proceeding.

5. Petitioner is not denied equal protection by reason of the sentence imposed.

6. The record does not show unlawful entrapment.

7. The court had jurisdiction to order sentence previously imposed to be placed in execution.

8. Alleged improper confinement of petitioner does not require her release from confinement.

POINT I.

Objections to Jurisdiction Upon the Ground That the Petition Filed in This Court Is Insufficient as a Petition for Original Writ of Habeas Corpus; There Is a Lack of Proper Parties Respondent, and Habeas Corpus Is Not the Proper Remedy.

A. THE PETITION FILED IN THIS COURT IS INSUFFICIENT AS A PETITION FOR ORIGINAL WRIT OF HABEAS CORPUS.

Examination of the copy of the petition filed in this court plainly indicates that such petition was not signed by the petitioner, and is not verified.

As a condition precedent to the issuance of a writ of habeas corpus there shall be filed a verified petition signed by the person for whose relief the writ is intended.

28 *U. S. C. A.* 454;

McDonald v. Hudspeth (C. C. A., Kan.), 113 Fed. (2d) 984.

It follows that such petition can only be considered as a petition for writ of certiorari to review the action of the state court.

B. THERE IS A LACK OF PROPER PARTIES RESPONDENT.

Examination of the record discloses that what is sought to be done is to review the judgment of the trial court by means of a writ of habeas corpus. Although it is firmly established that the warden or jailer is the only necessary party in an action challenging imprisonment upon a judgment absolutely void, it appears to us that where the purpose is to review the action of a lower court, acting within

its jurisdiction, the People of the State should be made a party respondent.

Inasmuch as this subdivision of our argument is quite closely connected with the following paragraph, we shall avoid repetition by including all argument under such paragraph heading.

C. HABEAS CORPUS IS NOT THE PROPER REMEDY.

It is well settled that habeas corpus reaches only to questions of jurisdiction of a court whose judgment is challenged.

Bowen v. Johnson, 306 U. S. 19, 23;
Knewel v. Egan, 268 U. S. 442.

The petition filed in the State Supreme Court discloses that at least a part of what was sought was a review of the decision of the Appellate Department of the Superior Court. It cannot well be urged that the Superior Court was not acting within its jurisdiction in affirming or reversing a judgment and order of the Municipal Court. If the decision of such court upon some federal question was erroneous, the petitioner, appellant in such court, had the right to a direct appeal to this court.

In regard to petitioner's contention that, after return of remittitur from the Superior Court the lower court exceeded its jurisdiction in committing the petitioner (although such commitment was nothing more than placing in execution a judgment previously rendered), such order of commitment was an order made after judgment from

which a new and separate appeal could have been taken (*Penal Code of California*, Sec. 1466, subd. 2, item b), and if the decision of the Superior Court upon such appeal be incorrect upon the federal questions involved, an appeal lies direct to this court.

Where a court has jurisdiction of the person and the subject matter in a criminal prosecution, the writ of habeas corpus cannot be used as a writ of error to review its decision.

Bowen v. Johnson, supra, 306 U. S. 19.

A writ of habeas corpus will seldom be issued to review in a federal court the proceedings in a criminal case in the state court.

Storti v. Mass., 183 U. S. 138;

Collins v. Johnson, 237 U. S. 502.

Paragraph IV of petitioner's petition to the State Supreme Court [Tr. p. 4, fol. 6, to p. 5, fol. 7] concerns the alleged method of imprisonment and has no bearing upon the validity of her sentence. The judgment of the trial court was that she be confined in the City Jail. The court had jurisdiction to impose confinement in the City Jail as punishment for misdemeanors.

Conceding for the purpose of this argument only that if a person be confined in a jail, the construction and furnishings of which are such as to result in inhuman punishment, this court has the power upon original habeas corpus to inquire into such confinement and order that the con-

ditions of confinement be changed, it still remains a fact that the petition to this court is insufficient to justify the issuance of an original writ.

Upon certiorari the most this court could do would be to order the state court to conduct a hearing to determine whether the alleged conditions actually existed; at which hearing the respondent would have an opportunity to refute the allegations of the petitioner. Pending such hearing the petitioner would not be entitled to absolute release; at most she would be entitled to release from improper confinement, if any.

The petitioner was committed July 9, 1943 [Tr. p. 16, fol. 23], for a period of 180 days, which period would expire on January 4, 1944, unless she be allowed time off for good conduct, in which case she would be released about December 7th. In other words, by the time the order of this court could reach the state court, the proceedings thereunder, including filing of respondent's answer, trial of questions of fact raised thereby, and decision of the state court made, the sentence of the petitioner would have long since terminated.

This court will not issue habeas corpus where the issues involved would have become moot before action of the court could become beneficial to the petitioner.

Ex parte Baez, 177 U. S. 378.

POINT II.

The Judgment of the Appellate Department of the Superior Court Is Not Void or in Excess of Its Jurisdiction.

Petitioner asserts [Tr. p. 2, fol. 3] that the Appellate Department substituted its judgment for that of the trial court, thereby requiring that the petitioner serve 180 days instead of 120 days as ordered by the trial court. Such statement is wholly incorrect. The original judgment of the trial court, which was the judgment affirmed, was that the petitioner serve 180 days. However, it appears that after the judgment was imposed the trial court attempted to suspend execution of such judgment and place the petitioner on probation subject to certain conditions, one of which was that 120 days of the probationary period be spent in the City Jail. The order suspending sentence and placing petitioner on probation for 120 days was no part of the sentence.

People v. Wallach, 8 Cal. App. (2d) 129.

The court, either before pronouncing judgment or subsequent to such action, may place a defendant on probation (*Penal Code of California,* Sec. 1203; *People v. Wallach, supra,* 8 Cal. App. (2d) 129), and an order placing a defendant on probation, even though it include as a condition thereof a period of detention in jail, is not a judgment and sentence.

In re Goetz, 46 Cal. App. (2d) 848.

It thus appears that, in effect, an order suspending execution of sentence and placing a defendant on probation, is an order made after judgment.

The Appellate Department had before it two matters, separate and distinct from each other: (1) the judgment of imprisonment, and (2) the order made after judgment. The court affirmed one and set aside or reversed the other.

Petitioner alleges [Tr. p. 3, fol. 4] that the Appellate Court had no authority to substitute its judgment for that which the judge of the Municipal Court wished to impose upon a reconsideration of the case. The judge of the Municipal Court had exercised his jurisdiction to sentence at the time he originally imposed sentence. He was thereafter without jurisdiction to change such sentence so long as it remained unreversed.

Ex parte Garrity, 97 Cal. App. 372.

Petitioner also alleges [Tr. p. 3, fol. 4] that the mandate of the Appellate Department left the trial court no alternative but to place the judgment in effect. This statement is also incorrect. The law is well settled in this State that upon receipt of remittitur affirming the judgment the trial court has jurisdiction to consider probation.

Lloyd v. Superior Court, 208 Cal. 622;

Ex parte Bost, 214 Cal. 150.

Summarizing the law it appears that, although the court may set aside a void judgment or correct an erroneous entry of judgment at any time, it may not change its mind and set aside a valid judgment and enter a new and different judgment. However, the court has jurisdiction to consider probation at any time prior to the time when a defendant enters upon execution of his sentence.

The trial court, therefore, was at liberty upon receipt of the remittitur to soften the rigors of the sentence upon application by defendant for probation or upon the court's own motion.

The petitioner's statement that the trial court revoked the petitioner's probation without a hearing is likewise incorrect. The Appellate Court had held that the original order of probation was void and of no effect; hence there was no order to be revoked. The petitioner may not now complain because probation was not granted after receipt of the remittitur as there is no showing that she made any application therefor prior to her commitment, or at any other time.

The cases universally hold that the granting of probation is a matter of grace and not of right. The cases further hold that the court may revoke probation without a formal hearing in the event it is made to appear that there is a good cause therefor.

Burn v. U. S., 287 U. S. 216;

In re Young, 121 Cal. App. 711, and cases therein cited.

Esco v. Zerbst, 295 U. S. 490, is readily distinguished because of the difference between the statute there involved and the California statute involved in the instant case (*Penal Code of California*, Sec. 1203.2).

In view of the fact that no order was in effect to be revoked it is deemed unnecessary to follow the subject of revocation farther.

POINT III.

The Municipal Court Did Not Lose Jurisdiction to Sentence.

In reply to petitioner's paragraph II of her petition to the California Supreme Court [Tr. p. 3, fol. 5] in which it is claimed that, because she was not sentenced within the time named in Section 1449 of the Penal Code of California the court lost jurisdiction to sentence, we observe such section provides that a defendant shall be sentenced within five days after the verdict, unless (a) time of sentence be extended for not to exceed ten days for the purpose of hearing a motion for a new trial, or (b) extended for not to exceed twenty days for consideration of probation.

The record discloses that the verdict of guilty was rendered on April 1, 1943; that the court ordered probation be considered, and that petitioner was sentenced on April 15, 1943, well within the time to which the court could extend time for sentence.

Section 1203, Penal Code of California, permits the court to consider probation upon request of the defendant or of the People, or upon the court's motion.

POINT IV.

The Alleged Invalidity of Conditions of Probation Is Immaterial to the Instant Proceedings.

In paragraph III of petitioner's petition to the State Supreme Court [Tr. p. 3, fol. 5] petitioner alleges that the order of the trial court, as part of the conditions of probation that she leave the state, was unconstitutional and void.

We have heretofore pointed out that such order was completely set aside by the judgment of the Appellate Court.

We have heretofore pointed out that the order of probation was no part of the judgment of conviction. Upon reversal and vacation of such order the defendant was in the same position as though the order had never been made.

It is well settled that a party may not complain of an order which does not affect him. The petitioner's insistence [Tr. p. 4, fol. 6] that the Appellate Court altered the judgment of the trial court is without foundation either in law or fact, as also is her statement that it was impossible to state what judgment the trial judge would have pronounced had he not pronounced an invalid judgment of banishment. We know what judgment he did pronounce, to wit, 180 days' imprisonment. We cannot know what terms of probation he would have imposed had he been asked to exercise his jurisdiction and consider probation after decision by the Appellate Court. As petitioner did not ask for probation she may not now complain because she does not know what terms would have been imposed upon her as conditions of probation.

POINT V.

Petitioner Is Not Denied Equal Protection by Reason of the Sentence Imposed.

We next direct attention to paragraph V of the petition to the State Supreme Court [Tr. p. 5, fols. 7, 8] in which petitioner urges that there has been unlawful discrimination by reason of the sentence of 180 days.

It is alleged upon information and belief that petitioner is the only "first" offender of the ordinance to be so sentenced. Assuming the truth of such assertion it nowhere appears that the facts and circumstances of such offense did not justify the punishment imposed. Establishing appropriate penalties for criminal offenses and granting judicial discretion respecting the punishment to be meted out in particular offenses does not violate the provisions of the Fourteenth Amendment.

Collins v. Johnson, supra, 237 U. S. 502.

A sentence is legal so far as it is within the provisions of law and the jurisdiction of the court over the person and offense.

U. S. v. Pridgeon, 153 U. S. 48.

Within the statutory limit, the sentence imposed is exclusively within the discretion of the trial court.

Fienberg v. U. S., 2 Fed. (2d) 955.

We must assume that facts before the court justified the exercise of the court's discretion in the instant case.

POINT VI.

The Record Does Not Show Unlawful Entrapment.

The burden of petitioner's complaint, in paragraph VI of her petition to the state court [Tr. p. 5, fol. 8, to p. 7, fol. 11], is that she was entrapped into committing the offense of which she was convicted.

Petitioner was convicted of having offered to have sexual intercourse with a male person. There appears no statement which can be construed as a denial of the fact that she did make such an offer as is proscribed by the ordinance. Assuming for the purpose of argument that petitioner's statement in regard to the incidents are correct, it nowise appears that any deceit, practiced for the purpose of making the acquaintance of the petitioner, tended to cause her to desire to have sexual intercourse with the person to whom she was thus introduced.

All the facts were known to petitioner at the time of trial, and evidence concerning them was introduced in the trial of the action. The jury resolved the facts against any unlawful entrapment. The facts were before the Appellate Court and the plea of unlawful entrapment was there again resolved against petitioner. It must be assumed in this collateral attack upon the judgment that the decisions of the lower courts were correct.

It is well settled that the function of the writ of habeas corpus is to inquire into the jurisdiction of the trial court, and that courts will not undertake to retry the issues of fact in such proceeding.

Bowen v. Johnson, supra, 306 U. S. 19.

This is especially applicable in the instant case where petitioner had the opportunity of appealing direct to this court for determination of all federal questions involved. Instead of doing so, she elected to present the question upon her interpretation of the record.

This case is readily distinguished from cases such as the *Mooney* case, in which it was alleged in the petition that extrinsic fraud was an element of the prosecution and it appeared that proof of such fraud was not available to the defendant until after his trial and conviction.

Neither does the situation in this case fit in with the case of *Chambers v. Florida,* 309 U. S. 227, cited by petitioner, wherein it appears that the entire record of the lower court was before this court for examination.

The case at bar is also readily distinguishable from *Waley v. Johnson,* 316 U. S. 101, in which it appears that the matters sought to be inquired into were matters which would not have been disclosed by the record on appeal if an appeal had been taken.

POINT VII.

The Court Had Jurisdiction to Order Sentence Previously Imposed to Be Placed in Execution.

Petitioner's paragraph VII [Tr. p. 7, fol. 11] is in effect a repetition of the claim set out in paragraph II, and requires no additional discussion except as to the allegation concerning punishment for ten days by confinement between date of conviction and date of sentence.

The right of courts to require persons convicted of criminal offenses to be confined awaiting sentence, is too well settled to justify extensive argument. It is likewise well settled that such confinement is not considered as any part of the punishment for crime.

POINT VIII.

Alleged Improper Confinement of Petitioner Does Not Require Her Release From Confinement.

In paragraph B of her petition to this court (Petition for Writ, pp. 4, 5) petitioner makes certain statements concerning alleged conditions of confinement. Such petition does not appear to have been verified, for which reason such statements may be disregarded herein.

Similar allegations, however, appear in the verified petition filed in the state court [Par. IV, Tr. p. 4, fols. 6, 7]. Our statute provides that the sheriff shall accept prisoners and provide them with necessary food, clothing and bedding (*Penal Code of California,* Sec. 4015) and the duty of the chief of police to prisoners in the City Jail is the same as that of the sheriff (*Penal Code of California,* Sec. 4022). There is a presumption that official duty has been done.

The petition does not allege that the bunk assigned to the petitioner for her use differs in any respect from the bunks assigned to and used by the hundreds of other prisoners confined in the same jail.

The statutes of this State provide for the inspection of jails and reports concerning their condition (*Welfare and Institutions Code of California,* Secs. 215, 216) and the Grand Jury must inquire into the condition and management of public prisons (*Penal Code of California,* Sec. 923). It must be presumed that officials charged with the duty of inspection have performed their duties and that

the equipment, furnishings and accommodations in our jails do not unfavorably compare with those which are standard throughout the State.

Section 681 of the Penal Code of California declares it to be a misdemeanor to use in a jail any cruel or unusual punishment upon, or allow any lack of care of, prisoners. It cannot well be assumed that the Chief of Police of this City has violated such law.

Although the procedure adopted by petitioner affords no ready method whereby the respondent at this stage of the proceedings may file a verified answer to the allegations in her petition concerning facts which are not part of the record of the trial court, we feel that the allegations made by her are insufficient to warrant any affirmative action by this court.

Assuming, however, that we are incorrect in that respect, it is plain that petitioner is not entitled to her release from jail. The most she is entitled to is a release from improper treatment in such jail. It would be a peculiar situation indeed if acts amounting to mistreatment of a prisoner by a jailer entitled such prisoner to entire freedom from punishment. His debt to society is not so easily paid, although perhaps the jailer would be subject to criminal prosecution for his acts.

Conclusion.

The respondent submits that the petition in this action is wholly insufficient to justify the issuance of an original writ of habeas corpus, and is likewise insufficient to justify issuance of a writ of certiorari to review the judgment pronounced against the petitioner.

The most that can be said for the petition is that, when viewed in the most charitable light, it might justify an order to the state court to permit a hearing, after answer filed by the respondent, upon the question of whether the imprisonment of petitioner is accompanied by improper conditions due to actions of the jailer. We do not deem the petition sufficient, however, to justify such action and we urge that certiorari should be denied.

Respectfully submitted,

RAY L. CHESEBRO,
City Attorney;
DONALD M. REDWINE,
Assistant City Attorney;
JOHN L. BLAND,
Deputy City Attorney,
Counsel for Respondent.